A **Palmerston Holdings Sdn Bhd lwn Neo Cheng Soon dan satu lagi**

B MAHKAMAH TINGGI (MELAKA) — GUAMAN NO 22–163 TAHUN2002
MOHTARUDIN BAKI H
4 MAY 2007

C *Acara Sivil — Pelaksanaan spesifik — Permohonan untuk — Jualbeli hartanah — Pembeli selepas membayar 10% harga belian tidak membayar apa-apa bayaran kemajuan — Sama ada perjanjian jualbeli tersebut dibatalkan — Sama ada plaintif perlu membatalkan perjanjian dan 'mitigate its loss' dengan menjual hartanah tersebut — Sama ada plaintif patut diberikan pelaksanaan spesifik*

D *Kontrak — Jualbeli hartanah — Pelaksanaan spesifik — Pembeli selepas membayar 10% harga belian tidak membayar apa-apa bayaran kemajuan — Sama ada perjanjian jualbeli tersebut dibatalkan — Sama ada plaintif perlu membatalkan perjanjian dan 'mitigate its loss' dengan menjual hartanah tersebut — Sama ada plaintif patut diberikan pelaksanaan spesifik*

E

Permohonan plaintif/responden ialah untuk penghakiman terus di bawah A 81 k 1(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980. Tuntutan plaintif di dalam writ saman ialah untuk pelaksanaan spesifik dan perintah-perintah berkaitan dengannya.
F Plaintif adalah syarikat pemaju telah memasuki perjanjian jualbeli sebuah apartmen dengan defendan-defendan/perayu selaku pembeli pada 3 Disember 1993 dengan harga RM273,000. Selepas membayar 10% harga belian, defendan-defendan tidak membayar apa-apa bayaran kemajuan seterusnya. Mengikut defendan-defendan pembatalan perjanjian tersebut telah dipersetujui oleh wakil plaintif melalui
G perbincangan melalui telefon. Terdapat empat isu yang ditimbulkan: (i) sama ada perjanjian jualbeli tersebut dibatalkan; (ii) sama ada 'mitigation of loss' perlu atau tidak; (iii) sama ada plaintif perlu membatalkan perjanjian di bawah kl 9 perjanjian tersebut; (iv) sama ada 'pelaksanaan spesifik' harus ditolak atas alasan 'hardship to the defendant'.

H

**Diputuskan**, membenarkan permohonan dengan kos:

(1) Pihak defendan-defendan tidak membawa sebarang bukti dokumentari tentang persetujuan pembatalan perjanjian tersebut. Adalah jelas di sisi
I undang-undang apabila plaintif dan defendan-defendan memasuki perjanjian jualbeli, kedua-dua pihak mempunyai tanggungan dan obligasi seperti yang dipersetujui bersama. Untuk membatalkan perjanjian ianya perlu dipersetujui oleh kedua belah pihak. Ianya tidak boleh dibatalkan secara 'unilateral'. Sebagai seorang yang 'prudent' defendan-defendan sepatutnya membuat apa-apa dokumen pembatalan yang dipersetujui dan ditandatangani oleh pihak

plaintif. Tanpa bukti kukuh bahawa pihak plaintif telah bersetuju membatalkan perjanjian tersebut maka ianya hanyalah 'bare assertion'. Perlu diingat di bawah s 103 Akta Keterangan 1950, defendan-defendan perlu membuktikan fakta bahawa perjanjian tersebut telah dibatalkan secara persetujuan bersama (lihat perenggan 8–9).

(2) Isu kedua dan ketiga 'mitigation of loss', berhubungan dengan isu plaintif sepatutnya menjual 'apartmen' tersebut apabila defendan-defendan gagal membuat bayaran kemajuan, perkataan yang digunakan ialah 'may' di kl 9. Hak ini adalah hak vendor (plaintif) jika mereka memilih untuk menjalankan hak mereka di bawah klausa ini, mereka perlu patuhi keperluan yang ditetapkan. Persoalan yang menjadi isu bukan plaintif yang ingin membatalkan perjanjian, tetapi defendan-defendan yang ingin membatalkannya. Isu 'mitigation of loss' tidak berkaitan. Plaintif tidak memilih untuk membatalkan perjanjian tersebut (lihat perenggan 13 & 16).

(3) Mahkamah berpendapat bahawa plaintif mempunyai dua remedi pilihan, sama ada mengambil remedi di bawah perjanjian jualbeli atau dari undang-undang sedia ada (di dalam kes ini Akta Relif Spesifik 1950). Di dalam kes *Palmerston Holdings Sdn Bhd v Chong Siew Eng* [2007] 7 CLJ 56, yang merujuk kepada kl 9(1)(a)(1), plaintif diberi hak remedi merampas bayaran-bayaran yang telah dibuat oleh defendan iaitu melebihi 50% dari harga belian; tetapi kes ini defendan-defendan hanya membayar 10% dan terus berdiam diri. Di manakah plaintif untuk mendapat pengadilan 90% baki bayaran — jika tidak melalui pelaksanaan spesifik (lihat perenggan 29 & 34).

**[English summary**

The plaintiff/respondent's application was for summary judgment pursuant to O 81 r 1(1)(a) of the Rules of the High Court 1980. The plaintiff in its writ of summons claimed for specific performance and orders related to it. The plaintiff was a housing developer who had entered into a sale and purchase agreement for an apartment with the defendants/appellants as purchasers on 3 December 1993 for the purchase price of RM273,000. After having paid the 10% of the purchase price, the defendants had not made any progress payment. According to the defendants, the agreement was terminated which was agreed upon by the plaintiff's representatives through discussions over the phone. There were four issues raised: (i) whether the sale and purchase agreement was terminated; (ii) whether there ought to be 'mitigation of loss'; (iii) whether the plaintiff needed to terminate the agreement pursuant to cl 9 of the said agreement; (iv) whether 'specific performance' ought to be dismissed on grounds of 'hardship to the defendant'.

**Held**, allowing the application with costs:

(1) The defendants did not disclose any documentary evidence on the agreement to terminate the sale and purchase agreement. It is trite law that when a plaintiff and defendant entered into a sale and purchase agreement, both parties are bound by responsibilities and obligations as agreed upon. Termination of an agreement had to be agreed upon by both the parties.

It could not be terminated unilaterally. As prudent persons, the defendants ought to have prepared any termination documents agreed upon and signed by the plaintiff. Without substantive evidence that the plaintiff had agreed to terminate the agreement, it was only a bare assertion. It must be borne in mind that under s 103 of the Evidence Act 1950, the defendants had to prove the fact that the agreement was terminated by a joint consent (see paras 8–9).

(2) The second and third issue on 'mitigation of loss', whereby the plaintiff ought to have sold the apartment when the defendants failed to make progressive payment, the word used in cl 9 was 'may'. Such was the right of the vendor (plaintiff) if they chose to exercise their rights under this clause, they should then follow the requirements as stated. The question at issue was not whether the plaintiff had wanted to terminate the agreement, but it was the defendants who wanted to terminate it. The issue on 'mitigation of loss' was not related. The plaintiff did not choose to terminate the agreement (see paras 13 & 16).

(3) The court opined that the plaintiff had two remedies to choose from, whether to choose the remedy pursuant to the sale and purchase agreement or from existing law (in this case the Specific Relief Act 1950). In the case of *Palmerston Holdings Sdn Bhd v Chong Siew Eng* [2007] 7 CLJ 56, which referred to cl 9(1)(a)(1), the plaintiff was given the right to forfeit payment that had been made by the defendant ie more than fifty per cent of the purchase price; but in this case the defendant paid only 10% and did not pay further. Where then should the plaintiff seek justice for the 90% of the balance purchase price — if it was not through specific performance (see paras 29 & 34.]

**Nota-nota**

Untuk kes-kes mengenai pelaksanaan spesifik dalam jualbeli hartanah, lihat 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) perenggan 5006–5008.

Untuk kes-kes mengenai permohonan untuk pelaksanaan spesifik, lihat 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) perenggan 6390–6391.

**Kes-kes yang dirujuk**

*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (dirujuk)
*Ibrahim bin Saidin & Anor v Hitam bin Ali* [1954] MLJ 19 (dirujuk)
*Kesang Leasing Sdn Bhd v Longwood Sdn Bhd & 3 Ors* [1988] 2 MLJ 328 (dirujuk)
*Lim Sin Oo & Ors v Chean Tjeng Siong* [1989] 2 MLJ 44 (dirujuk)
*Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 (dirujuk)
*Palmerston Holdings Sdn Bhd v Chong Siew Eng* [2007] 7 CLJ 56 (dirujuk)
*Palmerston Holdings Sdn Bhd v Sulastri Mohd. Hoessein Enas* [2005] 8 CLJ 423 (dirujuk)
*Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155 (dirujuk)
*Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 (dirujuk)
*Zaibun binti Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92 (dirujuk)

**Undang-undang yang dirujuk**

Akta Keterangan 1950 s 103
Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966
Akta Relif Spesifik 1950 ss 19, 20(1)
Kaedah-Kaedah Mahkamah Tinggi 1980 A 81 kk 1(1)(a), 2(2)

*TK Kee (Chee Siah Le Kee & Partners) bagi pihak plaintif/responden.*
*KC Tho (KC Tho & Partners) bagi pihak defendan-defendan/perayu.*

**Mohtarudin Baki H:**

**[1]** Permohonan plaintif/responden di dalam lampiran (20) ialah untuk penghakiman terus di bawah A 81 k 1(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980. Tuntutan plaintif/responden di dalam writ saman ialah untuk pelaksanaan spesifik dan perintah-perintah berkaitan dengannya.

**[2]** Afidavit sokongan plaintif/responden ialah lampiran (19). Manakala afidavit jawapan defendan-defendan/perayu ialah lampiran (22) dan afidavit balasan plaintif/responden di dalam lampiran (34) dan (39).

FAKTA KES

**[3]** Plaintif/responden adalah syarikat pemaju telah memasuki perjanjian jualbeli sebuah apartmen dengan defendan-defendan/perayu selaku pembeli pada 3 Disember 1993 dengan harga RM273,000.

**[4]** Selepas membayar 10% harga belian, defendan-defendan/perayu tidak membayar apa-apa bayaran kemajuan seterusnya.

**[5]** Dari afidavit jawapan defendan-defendan/perayu lampiran (22), terdapat empat isu yang ditimbulkan:

(i) sama ada perjanjian jualbeli tersebut dibatalkan.

(ii) sama ada 'mitigation of loss' perlu atau tidak.

(iii) sama ada plaintif/responden perlu membatalkan perjanjian di bawah kl 9 perjanjian tersebut.

(iv) sama ada "pelaksanaan spesifik" harus ditolak atas alasan "hardship to the defendant".

SAMA ADA PERJANJIAN TELAH DIBATALKAN ATAU TIDAK

**[6]** Mengikut defendan-defendan/perayu perjanjian tersebut telah dipersetujui oleh wakil plaintif/ responden melalui perbincangan melalui telefon (rujuk para 6(1) affidavit defendan-defendan/perayu lampiran (22)).

> Lebih kurang pada bulan April 1998, kami telah berbincang dan memaklumkan kepada salah seorang daripada pegawai atau pekerja plaintif yang bertanggungjawab, iaitu Encik Lee melalui telefon, bahawa kami tidak berminat untuk meneruskan perjanjian tersebut dan ingin membatalkan Perjanjian tersebut..

**[7]** Di dalam afidavit balasan plaintif/responden (lampiran (34) para 5) plaintif/responden menafikan mempunyai kakitangan atau pegawai bernama Encik Lee pada setiap masa material.

**[8]** Pihak defendan-defendan/perayu tidak membawa sebarang bukti dokumentari tentang persetujuan pembatalan perjanjian tersebut. Adalah jelas di sisi undang-undang apabila plaintif/responden dan defendan-defendan/perayu memasuki perjanjian jualbeli, kedua-dua pihak mempunyai tanggungan dan obligasi seperti yang dipersetujui bersama.

**[9]** Untuk membatalkan perjanjian ianya perlu dipersetujui oleh kedua belah pihak. Ianya tidak boleh dibatalkan secara "unilateral". Sebagai seorang yang "prudent'defendan-defendan/perayu sepatutnya membuat apa-apa dokumen pembatalan yang dipersetujui dan ditandatangan oleh pihak plaintif/responden. Tanpa bukti kukuh bahawa pihak plaintif/responden telah bersetuju membatalkan perjanjian tersebut maka ianya hanyalah "bare assertion". Perlu diingat di bawah s 103 Akta Keterangan 1950, defendan-defendan/perayu perlu membuktikan fakta bahawa perjanjian tersebut telah dibatalkan secara persetujuan bersama.

**[10]** Defendan-defendan/perayu mengakui bahawa mereka ada menerima surat tuntutan bayaran peringkat 2(b) Jadual Ketiga perjanjian dari Tetuan Nik Hussain & Partners bertarikh 21 Mac 1995 yang dikepilkan bersama sijil arkitek mengesahkan kemajuan kerja-kerja. Alamat defendan-defendan/perayu yang sama digunakan bagi "progress payments" yang lain seperti yang dieksibitkan di dalam eksh LPW2 lampiran (19) afidavit sokongan plaintif/responden.

**[11]** Begitu juga dengan surat-surat peguam plaintif/responden mengenai 'notice of demand' di dalam eksh LPW3 dan empat afidavit yang sama.

**[12]** Defendan-defendan/perayu tidak menafikan secara spesifik tentang surat-surat terutamanya 'notice of demand' tersebut. Jika benar bahawa perjanjian tersebut telah dibatalkan secara persetujuan bersama, sepatutnya defendan-defendan/perayu menjawab surat-surat tersebut menyatakan mengenai pembatalan yang dipersetujui. Dengan itu adalah jelas 'averment' bahawa perjanjian jualbeli tersebut telah dibatalkan dengan persetujuan plaintif/responden bukan sahaja 'bare assertion' malah ianya adalah 'afterthought'.

**[13]** Isu kedua dan ketiga 'mitigation of loss', plaintif/responden sepatutnya menjual "apartmen" tersebut apabila defendan-defendan/perayu gagal membuat bayaran kemajuan. Ini bersesuaian dengan kl 9 perjanjian:

> 9. Default by Purchaser and determination of Agreement.
>
> (1) If the Purchaser:
>
> (a) fails to pay any instalments payable under Clause 4(1) in accordance with the Third Schedule hereto or any part thereof and any interest payable under Clause 8; or
>
> (b) …;

(c) , …

The Vendor *may*, subject to subclause (2) hereof, annul the sale of the said Parcel and forthwith terminate this Agreement and in such an event:

(i) the Vendor shall be entitled to deal with or otherwise dispose of the said Parcel in such manner as the Vendor shall see fit as if this Agreement had not been entered into.

(Emphasis added.)

**[14]** Perkataan yang digunakan ialah "may". Ini bererti plaintif/responden mempunyai pilihan bukan mandatori.

(2) If the Purchaser fails to comply with any of the terms of this Agreement of if any of such unpaid instalments and interests remain unpaid for any period in excess of twenty eight (28) days after its due date, the Vendor shall give the Purchaser or his solicitors not less than fourteen (14) days notice in writing by A.R. Registered post to treat this Agreement as having been repudiated by the Purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.

**[15]** Klausa 9(2) ini memperuntukkan plaintif/responden perlu (shall) memberi notis bertulis kepada defendan-defendan/perayu atau peguam mereka tidak kurang dari 14 hari melalui surat berdaftar AR sebelum berhak untuk menganggap perjanjian tersebut dibatalkan.

**[16]** Di dalam kes di hadapan saya, pihak plaintif/responden tidak memberi notis tersebut, mereka tidak berhak untuk membatalkan perjanjian tersebut. Hak ini adalah hak vendor (plaintif/responden) jika mereka memilih untuk menjalankan hak mereka di bawah klausa ini, mereka perlu patuhi keperluan yang ditetapkan. Persoalan yang menjadi isu bukan plaintif/responden yang ingin membatalkan perjanjian, tetapi defendan-defendan/perayu yang ingin membatalkannya. Jika defendan-defendan/perayu ingin membatalkan perjanjian sekurang-kurangnya mereka perlu memberitahu plaintif/responden secara bertulis. Dalam fakta kes di hadapan saya defendan-defendan/perayu hanya berdiam diri. Adalah tidak adil menghukum plaintif/responden atas kegagalan defendan-defendan/perayu.

NAS UNDANG-UNDANG (CASE LAW)

**[17]** *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC) memutuskan:

Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

**[18]** *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 (CA) di ms 666 para I:

> What is very evident is that right from the start, the borrowers had no intention whatsoever of honouring their commitments to the bank. They defaulted paying every instalment. They ignored the bank's letters of demand.

**[19]** Mukasurat 667 para I:

> Their persistent failure to respond to the demand letters of the bank must be held to be an admission that the amounts claimed were in fact due and owing.

**[20]** Di dalam kes *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 (Court of Apopeal), di ms 288 para I:

> The appellant had failed to respond to the letter (dalam kes di hadapan saya beberapa surat dan notices of demand) it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.

**[21]** Seterusnya isu "mitigation of loss' Saya memutuskan isu ini tidak berkaitan. Plaintif/responden tidak memilih untuk membatalkan perjanjian tersebut.

**[22]** Kes *Kesang Leasing Sdn Bhd v Longwood Sdn Bhd & 3 Ors* [1988] 2 MLJ 328 di ms 334 YA VC George H memutuskan:

> There is no basis in equity or in law for raising mitigation as an issue for trial. The complaint is not made bona fide, has no merit, and may be and is rejected out of hand.

**[23]** Isu seterusnya ialah samada plaintif/responden berhak kepada pelaksanaan spesifik atas alasan "hardship to the defendants/appellants".

**[24]** Saya telah merujuk kes *Palmerston Holdings Sdn Bhd v Chong Siew Eng* [2007] 7 CLJ 56 (kes *Chong Siew Eng*)

**[25]** Di dalam kes tersebut YA Low Hop Bing H (ketika itu) memutuskan bahawa plaintif/responden tidak berhak kepada remedi di bawah s 19 Specific Relief Act 1950 atas alasan:

> Held:
>
> (1) The facts of the case would call for the application and interpretation of the SPA contained in sch H to reg 11(1) of the Housing Developers (now "Housing Development") (Control and Licensing) Regulations 1989, made under the Housing Developers (now "Housing Development") (Control and Liclensing) Act 1966 (collectively "the housing legislation"), (para 44)
>
> (2) *Applying the principles of interpretation to the facts of the instant case and having regard to the provisions of the SPA, it was plain and obvious that the plaintiff as the developer was not entitled to the decree of specific performance.* However, as the defendant had failed to

pay the instalments payable under cl 4(1) in accordance with the third schedule thereto or any part thereof, and the interest under cl 8, the plaintiff as vendor was entitled to annul the SPA and deal with the unit under cl 9(1)(a)(i). The instalments in the sum of RM 136,059, excluding interest, previously paid by the defendant, being more than 50% of the purchase price of RM247,380, shall be dealt with and disposed of under cl 9(1)(a)(ii)(a) and (b)(ii). (paras 52, 53, 54 & 55)

(3) The defendant's counterclaim was not statute barred because of the plaintiffs final letter of demand was dated 26 June 2003 and the defendant's counterclaim was filed in 2003. (para 57)

(4) This court gave judgment for the plaintiff in the sum of RM113,530.48 which was to be deducted from the total amount of RM 136,059 paid by the defendant by way of instalments to the plaintiff pursuant to the SPA. Judgment was also given for the defendant in the above residue sum of RM22,528 with interest at 8% p.a. from the date of judgment to the date of realization. (paras 58 & 59)

**[26]** Saya dengan rasa rendah diri dan penuh hormat berpendapat berbeza. Saya akui bahawa Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 memberi perlindungan kepada 'pembeli', tetapi pada masa yang sama sebagai mahkamah keadilan, saya perlu menjalankan tugas saya untuk melihat keadilan diberikan kepada kedua-dua belah pihak. Akta Perumahan (Kawalan dan Pelesenan) 1966 tidak secara spesifik menolak pemakaian Akta Relif Spesifik 1950.

**[27]** Specific Relief Act 1950 (s 19 terutamanya) adalah juga merupakan undang-undang yang digubal oleh Parlimen untuk keadilan semua pihak. Adalah tidak wajar menafikan hak plaintif/responden di bawah s 19 Akta Relif Spesifik 1950.

**[28]** YA Low Hop Bing H (ketika itu) juga telah memutuskan di dalam satu kes lain iaitu *Palmerston Holdings Sdn Bhd v Sulastri Mohd. Hoessein Enas* [2005] 8 CLJ 423 (kes *Sulastri*):

Held:

(1) The doctrine of laches in the court of equity is not an arbitrary or technical doctrine and the discretion is founded on the principle that there may be circumstances when it would be practically unjust to give a remedy of specific performance eg. either because a party has by his conduct done that which might be fairly be regarded as a waiver or put the other party in a situation in which it could be unreasonable to place him if the remedy were afterwards to be asserted — M. Ratnavale and Saad MNarvi. (p 426 g-h)

(2) The aforesaid delay of five years and 11 months occasioned by the plaintiff in filing this action for specific performance would in my view entitle the defendant to raise the defence of *laches* as a triable defence which would be sufficient to preclude the plaintiff from obtaining summary judgment under O 81 RHC. (p 427 b)

(3) The fundamental principles governing the granting or refusal of specific performance are set out in the case of *M Ratnavale* and they are basically that specific performance is an equitable remedy which is special and extraordinary in its character, that the court's power to grant it are not arbitrary or capricious but rather a discretionary power which is to be exercised on fixed principles and that the conduct of the plaintiff such as delay or laches, may render it inequitable to grant the remedy, (p 426 c-e)

(4) *The facts demonstrate to me that the defendant has no intention of proceeding with the completion of the said agreement, therefore the rights and obligations of the parties are to be*

*determined by reference to the said agreement. A perusal of the SPA shows no provision for the remedy of specific performance in the event of default of breach by the defendant,* (p 427 h)

(5) *As the remedy of specific performance has been omitted or in any event has not been spelt out in the SPA, the plaintiffs right to it is a triable or arguable issue and so the plaintiffs entitlement to the remedy of specific performance by way of summary judgment is not plain and obvious.* The plaintiffs remedy, if any, having considered s 20(1)(a) of the Specific Relief Act 1950 appears to be monetary in nature and that too subject to a reading of cl 9 of the SPA. (p 429 b-d)

(6) [6] In the circumstances, the plaintiffs application under O 81 RHC is dismissed with costs and the matter is ordered to proceed to trial. (p 429 h)

**[29]** Saya dengan rasa rendah diri berpendapat bahawa plaintif/responden mempunyai dua remedi pilihan, samada mengambil remedi di bawah perjanjian jualbeli atau dari undang-undang sedia ada (di dalam kes ini Akta Relif Spesifik 1950).

**[30]** Saya telah merujuk kepada kes *Ibrahim bin Saidin & Anor v Hitam bin Ali* [1954] MLJ 19 di mana YA Wilson J memutuskan di ms 20:

> Under the agreement it is provided that in the event of the failure of the defendant to transfer the lands in favour of the plaintiffs, the defendant agreed to pay the $3,000 to the plaintiffs. It has been argued that, assuming the agreement is genuine, the plaintiffs" only remedy is to claim the $3,000. The provision in the agreement referred to is one which is familiar to me and is one which is included in many similar agreements in this country. No authority has been quoted to me to show that where such a provision appears in any agreement the purchasers of property are precluded from claiming specific performance. *In my opinion the provision does not preclude a purchaser from claiming specific performance and is only intended to fix the damages which can be claimed if specific performance is not claimed in the event of a failure to carry out the terms of the agreement.* I give judgment for the plaintiffs as prayed.

**[31]** Di dalam keputusan No 5 kes *Sulastri* dinyatakan di dalam perjanjian jualbeli menyebabkan remedi plaintif/responden tertakluk kepada (kl 9) perjanjian jualbeli sahaja, sebaliknya YA Hakim seterusnya merujuk pula kepada s 20(1) Akta Relif Spesifik 1950 yang memutuskan:

> The plaintiff's remedy, if any, having considered s 20(1)(a) Specific Relief Act 1950, appears to be monetary in nature and that too subject to a reading of clause 9 of the SPA.

**[32]** Jika "specific performance" disebut maka Akta Relif Spesifik 1950 seharusnya tidak lagi dipertimbangkan.

**[33]** Saya telah merujuk kepada kes *Zaibun binti Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92 di mana Privy Council memutuskan di ms 94 para c kiri:

> The real question however is whether the judge was right to refuse specific performance. If he thought that the fixing of the sum of $5,000 deprived him of jurisdiction to order specific performance he appears to have ignored section 19 of the Specific Relief Act, the terms of which are as follows:

A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

If the judge considered he had jurisdiction to order specific performance but declined in the exercise of discretion to order it, he certainly in one respect took into consideration a wholly irrelevant matter — for in leading to a conclusion that 'specific performance ought not to be granted' he started the sentence 'Taking into consideration the alternative prayers of the plaintiffs in their pleadings ….'. The commonplace fact of an alternative claim for damages in an action by a purchaser for specific performance of a contract for the sale of land cannot conceivably be a fact relevant to the exercise of the discretion. Accordingly the Federal Court was entitled to exercise its discretion and in their Lordships" opinion was correct in reversing the decision of the judge and ordering specific performance.

Accordingly the appeal must be dismissed with costs, and their Loreships advise His Majesty the Yang di-Pertuan Agung accordingly.

**[34]** Di dalam kes *Chong Siew Eng* merujuk kepada kl 9(1)(a)(1), plaintif diberi hak remedi merampas bayaran-bayaran telah dibuat oleh defendan iaitu melebihi 50% dari harga belian; tetapi kes di hadapan saya defendan-defendan/perayu hanya membayar 10% dan terus berdiam diri. Di manakah plaintif/responden untuk mendapat pengadilan 90% baki bayaran — jika tidak melalui pelaksanaan spesifik.

**[35]** Saya juga merujuk dan bersependapat dengan YA Wan Adnan H (ketika itu), di dalam kes *Lim Sin Oo & Ors v Chean Tjeng Siong* [1989] 2 MLJ 44, di mana ianya diputuskan di ms 46 para c kanan:

Whether the plaintiffs can claim for specific performance in view of the provision of ell 7 and 13 of the agreement

The defendant contends that cl 7 of the agreement provides the only remedy available to the plaintiffs in event of breach. It is further contended that by virtue of cl 13 of the agreement only the purchaser (defendant) was entitled to the relief of specific performance.

Clause 13 must not be construed to include something it does not provide. It does not state that the vendor (plaintiffs) are disentitled to the relief of specific performance.

Section 19 of the Specific Relief Act 1950 states:

A contract, otherwise proper to be specifically enforced, may be enforced, though a sum be named in it as the amount to be aid in the case of its breach, and the party in default is willing to pay the same.

Clearly therefore the stipulation in cl 7 of a sum of money to be paid as damages in case of breach by the purchaser (defendant) is *not a bar to a claim for specific performance by the plaintiffs.* Further the clause says "at their absolute discretion … ". This shows that under the provisions of cl 7 *the plaintiffs (vendor) had the choice of either determining the agreement and forfeiting the deposit of $99,900 or claiming for specific performance.*

I therefore held that the plaintiffs were entitled to claim for specific performance of the agreement.

**[36]** Isu seterusnya yang dibangkitkan oleh defendan-defendan/perayu melalui para 10 afidavit jawapan (lampiran 22) ialah samada pelaksanaan spesifik harus ditolak atas alasan "hardship to the defendants".

**A** **[37]** Peguam defendan-defendan/perayu berhujah bahawa defendan-defendan/perayu mengalami masalah kewangan, ketika itu keadaan ekonomi merosot, ini merupakan isu yang perlu dibicarakan.

**B** **[38]** Saya menolak hujah ini. Semasa perjanjian jualbeli dimasuki ianya adalah 'willing seller and willing purchaser'. Tiada tekanan atau paksaan. Kedua-dua pihak sedar dan faham mengenai tanggungan masing-masing.

**[39]** Saya merujuk kes *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155 (SC) di mana di ms 158 para H kiri menyatakan:

**C**

> We agree with the learned judge when he said that the hardship had been brought by the appellant himself when he decided to embark on this expensive venture without having secured adequate finance..

**D** **[40]** Dari keseluruhan fakta, saya bersetuju dengan peguam paintif/perayu bahawa apabila defendan-defendan/perayu hanya membayar 10% deposit dan terus berdiam diri adalah jelas ianya merupakan satu "spekulasi". Adakah undang-undang apabila keadaan ekonomi merosot, harga apartmen tersebut jatuh, maka defendan-defendan/perayu tidak ingin meneruskan perjanjian. Perbuatan spekulasi seperti ini harus dibendung. Saya tidak fikir undang-undang perlu membantu defendan-defendan/perayu. Mereka seharusnya bertanggungjawab.

**E**

**[41]** Peguam plaintif/responden telah berhujah bahawa perjanjian tidak dibatalkan oleh plaintif/responden. Ini jelas apabila plaintif/responden telah membuat permohonan kebenaran Pihak Berkuasa Negeri/Foreign Investment Committee (defendan-defendan/perayu adalah rakyat Singapura) pada 13 Januari 1994. **F** Kebenaran telah diperolehi pada 27 Ogos 1994 walaupun keperluan untuk mendapatkan kebenaran ini tidak dinyatakan di dalam perjanjian jualbeli. Ini menunjukkan kesediaan plaintif/responden untuk meneruskan perjanjian.

**G** **[42]** Sebaliknya peguam defendan-defendan/perayu berhujah bahawa perjanjian jualbeli adalah conditional/bersyarat tertakluk kepada kebenaran Pihak Berkuasa Negeri. Dengan itu jelas ianya tidak sah kerana tidak menyebut perkara kebenaran Pihak Berkuasa Negeri tersebut. Malah kebenaran yang telah diberi terdapat beberapa syarat yang tidak disampaikan kepada defendan-defendan/perayu.

**H** **[43]** Saya menolak hujah ini. Perkara ini tidak ditimbulkan oleh defendan-defendan/perayu di dalam affidavit mereka. Jika defendan-defendan/ perayu

**[44]** memenuhi obligasi mereka membayar semua bayaran kemajuan tetapi akhirnya tidak bersetuju dengan syarat yang dikenakan oleh Pihak Berkuasa Negeri, **I** barulah hak mereka untuk membatalkan perjanjian mempunyai asas. Jelas sekali lagi alasan ini adalah "afterthought".

**[45]** Seterusnya defendan-defendan/perayu isu pengiraan faedah adalah 'triable issue'. Saya juga menolak hujah ini kerana isu faedah adalah berkaitan faedah bayaran lewat bukan alternatif kerana pelaksanaan spesifik.

**[46]** Seterusnya peguam defendan-defendan/perayu berhujah bahawa permohonan di bawah A 81 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 perlu dilampirkan minit penghakiman yang dipinta. Saya juga menolak bantahan ini. Kecacatan yang ada adalah "curable" kerana tidak memprejudiskan defendan-defendan/perayu.

**[47]** Dengan itu saya membenarkan permohonan plaintif/responden dengan kos seperti di dalam lampiran (20) kecuali prayer 'e'

*Permohonan dibenarkan dengan kos.*

Reported by Sally Kee